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No. 87-230

In The

Supreme Court of the United States

October Term, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

JEANNE A. JORDAN,
on behalf of herself and all others similarly situated,

Appellees.

On Appeal From The United States District Court For The Western District Of Oklahoma

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Appellees do not accept the Secretary's characterization of the appeal. Rather, there are three questions for consideration which should be stated as follows:

1. Whether or not there is jurisdiction under 28 U.S.C. § 1252 for review of the Secretary's appeal.

2. Whether or not the Secretary's appeal should be dismissed based on the doctrine of the "law of the case".

3. Whether there was an abuse of discretion by the district court in its April 10, 1987 ruling denying the Secretary's motion for relief from judgment pursuant to Rule 60(b)(6).

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MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the Secretary's appeal for the reason that jurisdiction does not exist under 28 U.S.C. § 1252. The Secretary has not satisfied the requirement of appealing from a ruling holding a federal statute unconstitutional. The instant appeal should also be dismissed because the law of the case was established in an unappealed 1983 final judgment.

Alternatively, should this Court consent to hear the Secretary's appeal, appellees move that the district court order be summarily affirmed on the ground that there was no abuse of discretion.

OPINIONS BELOW

The district court's original decision on the merits granting appellees' motion for summary judgment is contained in the Appendix to the Secretary's Jurisdictional Statement at pps. 23a-40a (hereinafter, "Sec. App."), and also is reported in the CCH Unemployment Insurance Reporter at ¶ 14,768.

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JURISDICTION

The Jurisdictional Statement was filed, following extension of time, on August 5, 1987. By Order of the Clerk dated September 1, 1987, the time to file a responsive pleading was extended to October 5, 1987.

As will be more fully discussed, appellees do not agree that the Secretary has satisfied the jurisdictional prerequisites of 28 U.S.C. § 1252.

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STATEMENT OF THE CASE

A. Statement of Fact

The named plaintiffs in this action are Jeanne A. Jordan and Barbara Leeds. Ms. Jordan was and continues to be disabled due to schizophrenia. Benefits totaling $2,356.90 were unlawfully expended by her payee sister despite not having cared for Ms. Jordan for over one year. No accountings, despite plaintiff's demands, were required of the former payee for in excess of eighteen months.

Ms. Leeds also suffers from a mental impairment. Her payee unlawfully spent nearly $9,000 of her retroactive disability award. Ms. Leeds never received a detailed accounting by her payee.

B. Proceedings Below

Appellees filed this action in September 1979 to challenge the Social Security Administration's failure to monitor or otherwise effectively supervise individuals who are designated as representative payees for the receipt and expenditure of Social Security and Supplemental Security Income benefits. Plaintiffs' claims were based upon 42 U.S.C. §§ 405(a), (b), (j); 1383(a)(2), (c)(1), and (e)(1)(A), and the Due Process Clause of the Fifth Amendment.

In a memorandum opinion dated September 26, 19[illegible], the district court certified the case as a class action pursuant to Rule 23(b)(2), F. R. Civ. P. The scope of the class was nationwide and included all recipients of Social Security benefits and Supplemental Security Income who have representative payees.

Following extensive discovery and cross-motions for summary judgment, the district court rejected the Secretary's position that the Social Security Administration had no obligation to monitor the expenditure of benefits by payees. *Jordan v. Schweiker*, 79-994-W (W.D. Okl., Mar. 17, 1983). (See Sec. App., at 23a) The District Court held that the Secretary had violated the due process rights of beneficiaries by failing to institute a mandatory periodic accounting requirement. (*Id.*, at 34a-37a)

The court's decision was reached after a thorough evaluation of plaintiffs' claims under the exacting stan-

dards set forth by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). District Judge Lee R. West found that the risk of beneficiaries being erroneously deprived of benefits under the Secretary's discretionary procedures was great, and the probable value of mandatory periodic payee accounting to be substantial. Consequently, the district court issued a permanent injunction, and ordered the defendant to implement mandatory periodic accounting procedures nationwide within one year. Plaintiffs' additional claims were denied. *Id.*

On May 10, 1983, the Secretary filed a notice of appeal from that order solely on the accounting issue. However, he later unilaterally moved to dismiss his appeal. On July 14, 1983, the Court of Appeals for the Tenth Circuit granted the Secretary's motion and dismissed the Secretary's appeal. *Jordan v. Heckler*, No. 83-1600.[1] (Supp. App., at 1a) Therefore, as of that date, the law of this case was that the Social Security Administration was required by due process of law to implement mandatory periodic accountings for all beneficiaries within the nationwide class.[2]

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[1]The Secretary inexplicably neglected to discuss this dismissal order in his Jurisdictional Statement, and omitted it from his Appendix. Therefore, appellees have included a copy in Appellees' Supplemental Appendix (hereinafter, Supp. App.).

[2]Plaintiffs' cross-appeal on the issue of a beneficiary's right to administrative review of a decision of "no misuse" of benefits by a payee was not dismissed. The court of appeals affirmed the district court's finding. *Jordan v. Heckler*, 744 F.2d 1387 (10th Cir. 1984). However, in a consolidated appeal, the court of appeals upheld the district court award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Equally important, Chief Judge Seth specifically noted that "The Secretary did not appeal the trial court's order as to accounting, and indicated that it agreed with it." *Id.* at 1401.

Notwithstanding the effect of the dismissal, the Secretary purported to implement the district court's judgment through a random survey of only ten percent of payees annually rather than mandatory periodic accounting by all payees in the nationwide class. Subsequent to the Secretary's refusal to establish mandatory accounting procedures for all payees, plaintiffs filed a Motion for Order Enforcing Judgment. In response, the Secretary did not argue, and failed to present any evidence, that parental and spousal payees (or any other category) should be exempted from accountings.

By order dated March 26, 1984, the district court reaffirmed the plaintiffs' arguments and explicitly held that the Due Process rights of Social Security and SSI beneficiaries, as established in the 1983 final judgment, could only be protected by requiring periodic annual accountings by all payees. Further, the Secretary was ordered to take "immediate steps" to implement such a system. On July 2, 1984, that order was amended to allow institutional payees to be monitored once every three years under the Secretary's On-Site Review Program.

On Aug. 29, 1984, the Secretary filed a notice of appeal from the March 26, 1984 Order, as amended. Subsequent thereto, the Secretary filed his initial Motion For An Indicative Ruling and Relief From Judgment in the district court pursuant to Rule 60(b)(6), F. R. Civ. P.

In his Rule 60(b) motion, the Secretary argued that recently enacted legislation was in conflict with the 1983 district court judgment. It was asserted that under Section 16 of Pub. L. No. 98-460 (the Social Security Disability Benefits Reform Act of 1984), parental and spousal

payees with beneficiaries in their custody were exempted from accounting.[3] Finally, the Secretary argued that the district court should conform its prior judgment and Order to the changes contained in the congressional legislation.

By order dated January 18, 1985, the district court denied the Secretary's Rule 60(b) motion. Judge West noted that although deference is usually given congressional action, such changes cannot undermine minimal constitutional guarantees. Moreover, the trial judge expressly stated that beneficiaries in the custody of parental or spousal payees were entitled to the same due process protections as all other beneficiaries with representative payees. *Jordan v. Heckler*, Civ. No. C-79-994-W (W.D. Okl.). (Sec. App., at 48a, 54a)

The district court cited *Aune v. Reynders*, 344 F.2d 835 (10th Cir. 1965), as controlling Tenth Circuit precedent for consideration of Rule 60(b) motions. The court agreed with plaintiffs' contentions and explicitly held that " . . . defendant is not entitled to relief from judgment". (*Id.*, at 48a)

In support of its holding, the court reasoned as follows:

> The only way by which the Secretary can avoid the mandatory annual accounting is to establish that beneficiaries' due process rights are being adequately provided through some alternative means. . . . However, no such showing has been made for either of the two

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[3]Section 16 amends Sections 205(j) and 1631(a)(2) of the Social Security Act. 42 U.S.C. § (Supp. III) 405(j), and 1383(a)(2). This was the first occasion on which the Secretary maintained that such payee exemptions should be adopted by the court.

> categories [spousal/parental payees] set out above. Beneficiaries in these two categories have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed.
>
> . . . The Secretary has had several chances to present the necessary evidence and has failed to do so. The Court will not indefinitely delay the termination of this case to allow the Secretary to present evidence which could have been presented at least ten months ago.

(*Id.*, at 54a) The Secretary did not file a notice of appeal from the order either to this Court or the Court of Appeals for the Tenth Circuit.

On Jan. 5, 1987, the court of appeals dismissed the Secretary's appeal on the merits concluding that the Secretary had failed to present arguments pertaining to the March 26, 1984 order (enforcing the 1983 judgment). *Jordan v. Bowen*, 808 F.2d 733 (10th Cir. 1987). Consequently, a unanimous panel held that the Secretary had effectively abandoned those issues in favor of attempting to argue the legislative exemptions. *Id.*, at 736. The appellate court further noted, however, that the Secretary had failed to file a notice of appeal of the Jan. 18, 1985 district court order. Writing for the panel, Judge McWilliams stated that because of this fatal omission, the Rule 60(b) Order was not properly before the court and would not be considered. Thus, the Secretary's appeal was dismissed in its entirety.

Apparently intent upon circumventing the obvious jurisdictional defect occasioned by his failure to file a notice of appeal from the Jan. 18, 1985 denial of relief

from judgment, the Secretary filed a second Rule 60(b) motion in the district court. However, this renewed motion was identical in form and substance to the original.

Once again, the district court found that the Secretary was not entitled to relief. However, this order was not premised upon a constitutional analysis. Rather, the court specifically observed that:

> The Court has not only engaged once in the analysis required by *Mathews v. Eldridge*, 424 U.S. 319 (1976), see Order of March 17, 1983, but also has already considered the legislative provisions cited by the Secretary and the need for protecting the due process rights of those beneficiaries for whom parents or spouses have been appointed representative payees. . . . [*T*]*he Court finds it unnecessary to readdress those arguments. Accordingly, the Secretary's instant Motion for Relief of Judgment should be and is hereby DENIED.*

Jordan v. Bowen, No. Civ. 79-994-W (W.D. Okl., Apr. 10, 1987). (emphasis added) (Sec. App., at 4a, 5a) It is from that order that the instant appeal was taken.[4]

The Secretary's Petition for Rehearing in the court of appeals was summarily denied on June 19, 1987. As this Court is aware, the Secretary has also filed a Petition for Writ of Certiorari from the Jan. 5, 1987 decision by the court of appeals. *Bowen v. Jordan*, 87-245. Appellees have filed a separate response to the Secretary's petition.

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[4]The Secretary has also appealed to the Court of Appeals from the April 10, 1987 district court order denying his Rule 60(b) motion.

ARGUMENT

I. THE COURT HAS NO JURISDICTION TO HEAR THE PRESENT APPEAL UNDER SECTION 1252 AND THE SECRETARY'S APPEAL SHOULD BE DISMISSED

The Secretary maintains that this court has jurisdiction over the present appeal pursuant to 28 U.S.C. § 1252. Without any analysis, the Secretary boldly asserts that direct Supreme Court review of a district court's refusal to order relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure is encompassed by Section 1252's limited mandatory jurisdiction. Appellees contend, however, that Section 1252, whose lynchpin is the necessity of Supreme Court review when the constitutionality of federal statutes is in issue, cannot support jurisdiction here where the limitations of appellate review under Rule 60(b) prohibit this court from directly addressing the constitutionality of a federal statute.

By its terms, Section 1252 only provides direct appeal to this court when a lower federal court holds an Act of Congress unconstitutional; however, the statute is not to be read literally. *Heckler v. Edwards*, 465 U.S. 870 (1984). Indeed, Justice Marshall, writing for a unanimous *Edwards* court, emphasized that "inherent in the structure of § 1252 is that not all appeals in a case in which an Act of Congress has been held unconstitutional must be taken directly to this Court." 465 U.S. at 880. Only those cases where the "issue on appeal is the holding of statutory unconstitutionality" meet the dictates of § 1252. *Id.* See also *EEOC v. Allstate Insurance Co.*, 467 U.S. 1232

(1984)[5] and *Walters v. National Association of Radiation Survivors*, 105 S.Ct. 3180, 3187-88 (1985).

Section 1252 jurisdiction does not depend on the lower court expressly declaring the federal law unconstitutional. *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982). If the constitutional legitimacy of a federal statute has been *directly* confronted by the lower court *and* the constitutional issue is the subject of the appeal, then Section 1252 demands that appellate review be to this court and not to the court of appeals. *Walters v. National Association of Radiation Survivors, supra; McLucas v. DeChamplain*, 421 U.S. 21 (1975); *United States v. Raines*, 362 U.S. 17, 20 (1960).

In this case, however, the Secretary has appealed from an order of the district court denying a motion for relief from judgment under Rule 60(b)(6). In reviewing a denial of a Rule 60(b) motion the role of an appellate court is extremely limited. *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n. 7 (1978). The sole issue is the propriety of "the District Court's refusal to set aside its own judgment under Rule 60(b)." *In Re Design Classics Inc.*, 788 F.2d 1384, 1386 (8th Cir. 1986).

The substantive merits of the underlying case are not raised on appeal. *Id.* And the Secretary may not use the

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[5]Ironically, this court dismissed the appeal in *Allstate* at the behest of the Solicitor General. However, as in the present case, the Government in *Allstate* had also filed a notice of appeal to the circuit court. Thus, the resulting jurisdictional dismissal in this court simply allowed the government to pursue its appeal in the Fifth Circuit. Similarly, if this court grants appellees' motion to dismiss, the Secretary will still be able to pursue his appeal in the Tenth Circuit.

guise of review of a Rule 60(b) denial as a substitute for an appeal of the merits. See, e.g., *Lepore v. Vidockler, Inc.*, 792 F.2d 272 (1st Cir. 1984).

In addition to limitations on the substantive issues that can be raised, the standard of appellate review of a denial of a Rule 60(b) motion is governed by the more restrictive abuse of discretion standard. *Browder, supra.* Indeed, the abuse of discretion standard to be used in reviewing a Rule 60(b) case is even more limited than in other appellate situations where the standard is applicable.

> A motion under Rule 60(b) often puts to a court a question without a right answer. The district judge must weigh incommensurables—the value of finality, the probability that an error affected the outcome of the proceeding, the probability that a second go-round would produce a 'better' outcome, the costs of that second proceeding to the parties (and ultimately to society as the finality of judgments is undercut). Dealing with these intersecting planes of legal argument is a task of great subtlety, calling on all the skills of the district judges. It is not, however, a task that gives rise to 'error' (as opposed to questionable exercise of judgment), unless the judge leaves something important out of his analysis. That is why we have been so deferential in Rule 60(b) cases to decisions not to reopen.

Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831 (7th Cir. 1985).

In short, in order to find an abuse of discretion in denying a rule 60(b) motion, this court must find that "no reasonable man could agree with the district court." *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d

792, 795-96 (7th Cir. 1980). See also *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1071 (9th Cir. 1982) aff'd in part, rev'd in part (on other grounds), 466 U.S. 435 (1984) (a Rule 60(b) decision will be reversed "only upon a clear showing of abuse of discretion"); *Taylor v. United States Parole Commission*, 734 F.2d 1152, 1155 (6th Cir. 1984) (to find abuse of discretion the appellate court must have "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors").

Consequently, the issue on appeal in this case is not, as the Secretary contends, the constitutionality of a federal statute. Rather, this court is limited to determining whether Judge West acted unreasonably when he determined that the final judgment he entered in 1983 should not be vacated. In this procedural posture the constitutionality of the 1984 federal law, which the Secretary attempts to raise herein, is not before this court.

In fact, as the record below demonstrates, the district court itself never directly confronted the constitutionality of the new federal statute; nor was it required to do so. In its original 1983 decision the district court was only asked to determine the constitutionality of the Secretary's lack of accounting procedures; there was no accounting statute to review. Although the Secretary originally appealed from that holding, he subsequently voluntarily dismissed that appeal. See discussion at p. 16, *infra*. At that point, the merits of this case were *res judicata*.

Judge West's 1984 order clarifying that annual accountings were required for all payees was only an order enforcing his earlier final judgment and not a ruling on the underlying merits of the case. As a result, in denying the Secretary's subsequent motions to vacate the 1983 and 1984 orders, Judge West simply held that there were not sufficient exceptional circumstances to cause the court to vacate its previous detailed and carefully thought out rulings.[6] The district court never analyzed, nor was it obligated to do so, the constitutional validity of any federal statute.

Now, under the guise of § 1252, the Secretary asks this court to determine the constitutionality of a 1984 law without any review of that issue by the lower court. However, as Justice Brennan noted in his dissent in *Walters*, "a fully consummated determination that a federal statute is unconstitutional" is a necessary predicate of Supreme Court jurisdiction under § 1252. 105 S.Ct. at 3201 and 3203. The majority in *Walters* did not disagree that § 1252 review is limited to cases where the lower court has fully confronted the constitutionality of a federal statute; rather, the dispute in *Walters* was whether a preliminary injunction constituted a "fully consummated determination." Since the district court in *Walters* did in fact evaluate the ultimate constitutional issue that was later appealed to the Supreme Court, the majority found jurisdiction under § 1252. The same cannot be said for the lower court here. In fact, appellees can find no case like

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[6]This court has also long recognized that Rule 60(b) motions should be granted only in rare circumstances. *Ackerman v. United States*, 340 U.S. 193 (1950).

the present one where this court has found jurisdiction under § 1252 and the constitutionality of the federal statute in question had not been directly addressed by a lower court.

Moreover, the Secretary attempts to raise this previously undiscussed constitutional issue not in a direct appeal from a ruling on the merits of the case, but in a Rule 60(b) appeal from a refusal to vacate the final judgment entered four years earlier. The combination of the manner in which the issue of the statute's validity was presented to the district court and the limitations of appellate review of Rule 60(b) motions demonstrates that the constitutionality of the 1984 accounting amendments is not before this court.

In short, given the complicated procedural background of the case, this Court could not possibly confront the constitutionality of a federal statute. The sole prerequisite of § 1252 jurisdiction—the question of a statute's constitutionality—is missing. *Heckler v. Edwards, supra.* As a result the Secretary's appeal must be dismissed.

II. THE DOCTRINE OF THE "LAW OF THE CASE" REQUIRES THAT THE SECRETARY'S APPEAL BE DISMISSED

The Secretary has erroneously described the April 10, 1987 district court order as holding the 1984 representative payee exemptions as unconstitutional. Notwithstanding the failure to point out in his brief supporting language from the order, such a conclusion is a gross distortion of both the substance and unambiguous language contained in the opinion. Furthermore, the Secretary's

arguments ignore the fact that all salient constitutional questions were fully addressed in Judge West's 1983 final judgment and became the law of the case.

In denying the Secretary relief from the 1983 judgment a second time, Judge West ". . . again [found] that the Secretary is not entitled to the relief sought." (Sec. App., at 4a) The language of the Order clearly reflects that the constitutional questions regarding mandatory payee accounting were properly weighed in the court's 1983 judgment as required under the balancing test established by this Court in *Mathews v. Eldridge, supra.*

In the 1983 final judgment, Judge West explicitly held:

> Applying the factors in *Mathews v. Eldridge, supra,* this Court again finds that the private interest of beneficiaries in the receipt and proper use of social security benefits is substantial. This Court also finds that the risk of an erroneous deprivation of this interest through the procedures used is great and the probable value of mandatory accounting is substantial. This Court also finds that the fiscal and administrative burdens that mandatory accounting would entail would not be great. . . .
>
> This Court concludes that the discretionary accounting procedures now in effect do not provide due process to the social security beneficiaries for whom representative payees have been appointed. . . . Plaintiffs' Cross-Motion for Summary Judgment with respect to the provision for mandatory periodic accounting should be and is hereby Granted. Defendant is directed to implement appropriate mandatory periodic accounting procedures within one year from the date of this Order.

Jordan v. Schweiker, supra. (Sec. App., at 37a).

Although the Secretary initially decided to appeal the mandatory accounting ruling, he later moved to dismiss. On July 14, 1983, the Court of Appeals for the Tenth Circuit ordered the appeal dismissed. *Jordan v. Heckler*, No. 83-1600. (Supp. App., at 1a) As of that date, therefore, the question of the constitutional need for mandatory periodic accountings by all representative payees was resolved, and the preceding district court judgment was final. The district court holding that due process of law required accountings of all payees was *res judicata*. The Secretary had three years, two evidentiary hearings, and numerous motions and briefs within which to present relevant evidence and legal arguments. He lost. Furthermore, the Secretary expressly decided *not* to appeal. If he desired to appeal constitutional questions, he should have done so, and the Secretary cannot employ a Rule 60(b) motion four years later in lieu of a timely appeal. See p. 11, *supra*. The doctrine of the "law of the case" also precluded further consideration. *Arizona v. California*, 460 U.S. 605 (1983).

In his order of April 10, 1987, Judge West further indicated that the Secretary in January, 1985 submitted for consideration the legislative provisions in question. In response, the court expressed in strong language its displeasure with the Secretary's tardy attempt to reargue constitutional questions:

> Defendant has not offered any evidence that the due process requirements relied upon by this Court in its prior orders have been satisfied. The Court quite specifically ruled in its March 17, 1983 order that due process required mandatory periodic accounting by all payee representatives.

> . . . However, no such showing has been made for the two categories set out above. Beneficiaries in these two categories [who have parental and spousal payees] have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed.
>
> *Defendant should not read this order as an invitation to present further evidence on the two categories of beneficiaries above . . . [T]he Secretary has had several chances to present the necessary evidence and has failed to do so.*

Jordan v. Heckler, supra, (emphasis added) (Sec. App., at 54a) Despite the clear admonishment by the district court, and having failed to appeal the 1983 final judgment or file a notice of appeal from the 1985 denial of relief, the Secretary sought to resurrect his case by filing a second Rule 60(b) motion.

The result expressed in the April 10, 1987 order was, therefore, entirely predictable. Judge West, for the second time, denied relief from judgment and refused to ". . . readdress those arguments presented by the Secretary." *Jordan v. Bowen, supra.* (Sec. App., at 5a) The order is in full accord with the need for finality and an end to litigation.

This Court has extended the doctrine of the "law of the case" to decisions of a district court where, as here, *res judicata* has attached to a final decision. *Arizona v. California, supra,* at 619. Moreover, the doctrine demands that whenever a ruling of law is issued in a case, that decision will "govern the same issues in subsequent stages of the same case." *Id.* at 618.

As stated in the often quoted passage from *White v. Murtha,* 377 F.2d 428, 431 (5th Cir. 1967) (footnotes omitted):

> The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members,' and that it would be impossible for an appellate court 'to perform its duties satisfactorily and efficiently' and expeditiously 'if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof.

The Secretary's second Rule 60(b) motion was an attempt to abrogate this policy. Judge West, recognizing the need for finality and implicitly acknowledging that *res judicata* attached to the 1983 judgment, refused to reconsider constitutional issues again. Accordingly, the Secretary's renewed Rule 60(b) motion was forcefully denied.

To avoid the effects of the "law of the case" doctrine, a party must show that the "evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha, supra,* 377 F.2d at 432. See also, *Silkwood v. Kerr-McGee,* 769 F.2d 1451, 1462 (10th Cir. 1985). These exceptions are to be narrowly applied and some, such as manifest injustice, are to be used only in truly "exceptional circumstances." *Laffey v. Northwest Airlines,* 740 F.2d 1071, 1082 (D.C. Cir. 1984), cert. denied 105 S.Ct. 939 (1985).

The Secretary has not even discussed and, in any event, cannot demonstrate that these exceptions to the

"law of the case" rule are applicable here. Instead, the Secretary implied that a federal statute has been amended and, somehow, is determinative. As Judge West recognized, however, statutory alterations cannot affect the constitutional rights that are the controlling legal principle in this case.

Only if this Court had dramatically altered the due process analysis could the Secretary even suggest that the controlling law exception might be applicable. On the contrary, however, the *Mathews v. Eldridge, supra,* analysis employed by Judge West remains the applicable constitutional standard. The controlling law is unchanged. *Brock v. Roadway Express, Inc.,* 55 U.S.L.W. 4530, 4532 (April 22, 1987).

In sum, the Secretary is bound by the district court's unappealed final judgment that due process requires mandatory accountings for *all* payees. The doctrine of the "law of the case" precluded the district court from readdressing issues resolved in the 1983 final judgment. Accordingly, the doctrine is fully applicable here and constitutes a valid basis for dismissal of the Secretary's appeal by this Court.

III. THIS COURT SHOULD SUMMARILY AFFIRM THE RULING OF THE DISTRICT COURT SINCE THERE WAS NO ABUSE OF DISCRETION

If this Court agrees to accept the present appeal, appellees urge disposition of the matter by an order summarily affirming the ruling below. Summary affirmance is appropriate since the only issue the Secretary has appealed is the propriety of the district court's denial of

the Secretary's Rule 60(b) motion to vacate or amend the final judgment.

The Court's role in reviewing a denial of a Rule 60(b) motion, as appellees have explained above, is limited to determining whether the district court abused its discretion in deciding not to reopen its earlier judgment. *Browder v. Director, Department of Corrections, supra,* 434 U.S. at 263, n.7. See also *System Federation v. Wright,* 364 U.S. 642, 648 (1961) (district court has wide latitude in determining whether to grant a Rule 60(b) motion). Consequently, the sole issue that the Secretary presents to this court is whether Judge West acted unreasonably in concluding that the Secretary had failed to produce sufficient evidence or articulate sufficient reasons to justify the court vacating its final judgment. Appellees submit that the record here abundantly demonstrates that Judge West did not abuse his discretion in denying the Secretary's Rule 60(b) motion, so that the only appropriate course of action for this court is to summarily affirm the ruling below.

To determine whether the Secretary's motion to vacate should be granted, this court, as well as the district court, must apply the standards established in *United States v. Swift & Co.,* 286 U.S. 106, 114, 119 (1932). There, recognizing the need for finality and the critical importance of the principle of *res judicata,* Justice Cardozo crafted a test which allows the altering of final judgments *only* in rare and exceptional circumstances:

> There is a need to keep in mind steadily the limits of our inquiry. . . . We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The [decree], whether right or wrong is not subject to

> impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. The inquiry . . . is whether the changes are so important that dangers once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong by new and unforseen conditions should lead us to change what was decreed after years of litigation . . . .

More than thirty years later, Justice Blackmun, while sitting on the Court of Appeals, explained and amplified the *Swift & Co.* standards:

> Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.

Humble Oil & Refining Company v. American Oil Co., 405 F.2d 803, 813 (8th Cir. 1969)[7]

In the present case, Judge West correctly concluded that the Secretary had not met the difficult burden of demonstrating that this case meets the strict *Swift & Co.*

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[7]The principles crafted by Justice Cardozo and explained by Justice Blackmun unquestionably remain viable today and are employed by all the circuit courts. See, e.g., *Williams v. Lesiak*, 822 F.2d 1223 (1st Cir. 1987); *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987); *Dowell by Dowell v. Board of Education of Oklahoma*, 795 F.2d 1516 (10th Cir. 1986), cert. den. 107 S.Ct. 585 (1987); *Moolenaar v. Government of Virgin Islands*, 822 F.2d 1342 (3d Cir. 1987).

test. The Secretary's sole argument seems to be that the enactment of the 1984 amendments, which authorized an accounting program for only a portion of the representative payees subsequent to the district court's order holding that accountings for all payees are constitutionally mandated, meets the *Swift & Co.* standards. In short, the Secretary seems to believe that, because a law was passed granting only part of the relief given to plaintiffs by the courts, the district court had no choice but to modify its constitutionally based final judgment.[8]

However, as the courts of appeals have often noted, the mere passage of legislation which "might accomplish much of what a . . . decree was designed to achieve cannot be viewed as justification for vacating the decree." *Coalition of Black Leadership v. Ciani*, 570 F.2d 12, 14 (1st Cir. 1978). This is particularly true here where the district court's 1983 order is premised on the constitution. Congressional enactments cannot supercede constitutional requirements. Thus, it would be illogical to conclude, as the Secretary argues, that a congressional decision which eliminates more than half of the payees from an accounting program can overrule the lower court's constitutionally based injunction requiring accountings for all payees. See, e.g., *Williams v. Atkins*, 786 F.2d 457, 461 (1st Cir. 1986).

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[8]Appellees are forced to speculate as to the Secretary's reasoning because he has not addressed the propriety of the district court's ruling on the Rule 60(b) motion in his Jurisdictional Statement. Instead, the Secretary has only briefed the question of the constitutionality of the new 1984 law. Nowhere in his Jurisdictional Statement does the Secretary even mention the applicable standards to be applied either by the district court or this court in determining the appropriateness of a Rule 60(b) motion.

As this court noted in *Swift & Co.*, the test for determining whether the final judgment can be altered is whether the dangers which the district court originally sought to address have disappeared as a result of some new and unanticipated development. Even the Secretary recognizes that he cannot make such a contention here. By definition the new 1984 accounting amendment fails to address the constitutional needs of the majority of the payees. Thus, the dangers to the majority of the payees that were the basis for the lower court's ruling are not remedied by the 1984 amendments. On the contrary, Congress left most of the payees in the same place Judge West found them in 1983—with absolutely no due process protections. In light of these circumstances the court below could not have concluded that the dangers to the plaintiffs had become "attenuated to a shadow."[9]

Similarly, the Secretary has not argued, as the *Swift & Co.* standards require, that, absent Rule 60(b) relief, he will suffer extreme and unanicipated hardship. In fact, any current difficulties faced by the Secretary are a result of the district court's original order and were fully known to the Secretary at the time the order was entered. The "hardship", if any exists, has not been created by any intervening developments. The 1984 amendments *do not* increase the burdens on the Secretary. Indeed, for

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[9]In addition, the Secretary's own internal study, which was before the district court, also concluded that accountings were necessary to protect the rights of beneficiaries who had payees. OA Representative Study, Final Report, Feb. 8, 1983, at pps. 9-10. There is nothing in that study which suggests that merely providing accountings for a few payees will satisfy the needs of the remaining unprotected beneficiaries.

some of the payees, they conform to the district court's order. Congress has not asked the Secretary to do anything greater than or inconsistent with Judge West's orders.

In addition, the Secretary has had numerous opportunities to present arguments and/or evidence to the district court demonstrating that accountings were not necessary for spousal and parental payees. Yet, despite years of litigation, numerous motions, and the Secretary's participation in and knowledge of the 1984 Congressional action, the Secretary never attempted to bring this issue before the district court. See District Court Order of Jan. 18, 1985. (Sec. App., at 54a) "A party that has not presented known facts helpful to its case by witnesses available to it 'when it had the chance cannot ordinarily avail itself of Rule 60(b) after an adverse judgment has been handed down' . . . . Rule 60(b) is not a substitute for appeal." *Moolenaar v. Government of Virgin Islands, supra,* 822 F.2d at 1347 (quoting from *Good Luck Nursing Home Inc. v. Harris,* 636 F.2d 572, 577 (D.C. Cir. 1980)). See also *Rajender v. University of Minnesota,* 730 F.2d 1110 (8th Cir. 1984).

However, in the present case, the Secretary is undoubtedly attempting to use a series of Rule 60(b) motions exactly for that purpose. In fact, the Secretary unashamedly admits that his goal here is to have an appellate court reach the constitutional issues raised by the merits of appellees' case. This is evidenced first by the Secretary's repeated pleas to both this court and the Tenth Circuit that he desperately needs an opportunity to have an appellate court re-examine the basic constitutional rulings of the lower court. This apparently ex-

plains the Secretary's numerous *Jordan* appeals. See discussion at pp. 4-9, *supra*.

Second, the primary constitutional issues addressed in the Jurisdictional Statement relate not to the constitutionality of the new 1984 accounting amendments, but to the constitutional basis for the district court's original decision. The Secretary seeks not to protect the constitutionality of a federal law, but to undercut the validity of the district court's final judgment which the Secretary himself explicitly chose not to contest on appeal. See Tenth Circuit Order of July 14, 1983. (Supp. App., at 1a) The Secretary's actions here are those of a desperate litigant who attempts to correct a bad strategic decision by trying to use Rule 60(b) as a way out of his dilemma.

Thus, the Secretary now seeks to employ Rule 60(b) as a guise for impeaching the validity of the lower court's original unappealed final judgment. As Justice Cardozo noted more than 50 years ago, such actions are prohibited. *United States v. Swift & Co., supra.* The courts have "stressed that Rule 60(b)(6) should not be used to relieve a party of the consequences of voluntary litigation choices or improvident strategic decisions." *Randall v. Merrill Lynch*, 820 F.2d 1317, 1321 (D.C. Cir. 1987); *Ackerman v. United States, supra.*

In sum, the Secretary has not demonstrated the kind of "unanswerable case" that Justice Blackmun noted would be necessary before the district court can be required to reopen and modify its final judgment in this case. In light of the Secretary's inability to meet the strict *Swift & Co.* standards, there is no doubt that Judge

West did not abuse his discretion in denying the Secretary's Rule 60(b) motion. Consequently, the district court's ruling should be summarily affirmed.

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CONCLUSION

The Court should dismiss for lack of jurisdiction and based upon the doctrine of the law of the case or, alternatively, summarily affirm since there was no abuse of discretion by the district court.

Respectfully submitted,

JOHN G. FEARS
NEAL S. DUDOVITZ
GILL DEFORD
Attorneys for Appellees

October, 1987.

No. 87-230

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In the Supreme Court of the United States

October Term, 1987

—o—

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

JEANNE A. JORDAN,
on behalf of herself and all others similarly situated,

Appellees.

—o—

On Appeal From The United States District Court For The Western District Of Oklahoma

—o—

MOTION TO DISMISS OR AFFIRM

—o—

APPELLEES' SUPPLEMENTAL APPENDIX

—o—

Court of Appeals Order of July 14, 1983 ..... 1a

MAY TERM—JULY 14, 1983

Before Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

JEANNE A. JORDAN, individually and on behalf of all other persons similarly situated,	)	
Plaintiff-Appellee,	)	
vs.	)	No. 83-1600
MARGARET HECKLER, individually and in her official capacity as Secretary of the Department of Health and Human Services,	)	
Defendant-Appellant.	)	

This matter comes on for consideration of the Secretary of Health and Human Services to dismiss the captioned appeal.

Upon consideration whereof, the motion is granted. The captioned appeal is dismissed. This order does not dispose of the appeal in 83-1636, which was filed as a cross-appeal to the captioned appeal.

HOWARD K. PHILLIPS, CLERK

By: /s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk